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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1327

THE BOEING COMPANY

(formerly The Boeing Airplane Company), *et al.*,

Petitioners,

—v.—

WILLIAM R. VAN GEMERT, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

Question Presented

In a successfully prosecuted class action, resulting in judgment for the class in the full amount of damages plus pre-judgment interest, should plaintiffs' counsel fees be assessed only against the claiming class members or against both the claimed and unclaimed portions of the judgment fund deposited in court especially where the defendants have no right to any of the unclaimed portion of the fund deposited and defendants' bad faith rendered difficult, and in some cases impossible, the locating of certain potential claimants?

Statement of Facts

This action was commenced thirteen years ago to recover damages on behalf of certain holders of 4½% Convertible Subordinated Debentures, due July 1, 1980 (the "Debentures") issued in bearer form by The Boeing Company ("Boeing"). Boeing called the Debentures for redemption in February 1966, but holders of $1,544,300 of unregistered Debentures did not learn of the call until after the conversion deadline, midnight, March 29, 1966. After that deadline, Debenture holders lost their right to convert $100 in principal of Debentures into two shares of common stock. The two shares were worth $316.25 on that day, but the uninformed Debenture holders only had the right to redeem their Debentures at $103.25.

William Van Gemert and several other non-converting Debenture holders brought this action against Boeing, in 1966, alleging inadequate and unreasonable notice of Boeing's call. This action was certified as a class action under Fed. R. Civ. P. 23(b) (1) and (2), upon motion of Boeing, by order of the District Court dated October 4, 1966. The class certified is:

> . . . plaintiffs and all other present and former holders of The Boeing Company (formerly Boeing Airplane Company) 4½% convertible subordinated debentures due July 1, 1980 and called for redemption on April 8, 1966 whose debentures were not surrendered for conversion on or before March 29, 1966. . . . Order of Hon. Sylvester J. Ryan entered October 4, 1966, at p. 8.

Plaintiffs' counsel successfully prosecuted this lawsuit and obtained a judgment, which has been deposited with the District Court and which, with interest, now exceeds

$7 million. This amount, which includes pre-judgment interest, is more than twice the initial amount of damages of the non-converting Debenture holders. Accordingly, plaintiffs' counsel have preserved, in full measure, the rights of the members of the class in an action which was not settled, but was fought, against able counsel, to the bitter end.

The tenacity with which this lawsuit was prosecuted and defended is demonstrated by a summary of its procedural history. After a full trial, the District Court dismissed the complaint. A panel of the Court of Appeals for the Second Circuit reversed, held Boeing liable for its failure to give adequate notice of the redemption, and remanded to the District Court for a determination of damages. *Van Gemert* v. *Boeing Co.*, 520 F.2d 1373 (2d Cir.), *cert. denied*, 423 U.S. 947 (1975) (*Van Gemert I*) (A53a).* The *Van Gemert I* Court held that ". . . there was an obligation on Boeing's part to give reasonably adequate notice of the redemption to the debenture holders, which obligation was not fulfilled in this instance." *Id.* at 1375 (A55a). Moreover, while the notice ". . . may have conformed to the requirements of the Indenture it was simply insufficient to give fair and reasonable notice to the debenture holders. *Id.* at 1383 (A73a).

On remand, the District Court calculated damages and a judgment was thereafter entered against Boeing for damages in the sum of $3,289,359. on December 28, 1976. The judgment did not award the plaintiff class pre-judgment interest and plaintiffs appealed therefrom.** In *Van Gemert* v. *Boeing Co.*, 553 F.2d 812 (2d Cir. 1977) (*Van*

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* Citations to the Appendix filed by Boeing shall be "A....a".

** No appeal was ever taken by Boeing from the entry of the judgment against it awarding the $3,289,359. to plaintiffs as damages.

Gemert II) (A45a), the Court of Appeals reversed and awarded plaintiffs pre-judgment interest, thereby increasing the amount of damages from $3,289,359. to $5,749,990.83. The Court based its award of pre-judgment interest on Boeing's breach of its contract with the plaintiffs, stating ". . . every contract contains the implied requirement of good faith and fair dealing. Boeing was found liable therefore because it breached its contract with appellants, and damages were awarded." *Id.* at 815 (A50a).

On the remand of *Van Gemert II,* the District Court entered judgment for "all members of the plaintiff class", and adjudged that plaintiffs recover the above damages together with pre-judgment interest thereon. The judgment was docketed on July 6, 1977, and no appeal was ever taken by Boeing from this judgment of interest added to the prior damage judgment. Boeing did appeal from a portion of this judgment which dealt, not with the monetary judgment against Boeing, but with a separate issue of the award of counsel fees—the District Court had further ordered that plaintiffs' attorneys be awarded fees, expenses, and disbursements from the total amount of the judgment (A39a). On appeal solely from this issue of the award of the attorneys' fees, the Court of Appeals reversed holding plaintiffs' attorneys' fees should only be charged against the amount claimed. *Van Gemert* v. *Boeing Co.,* 573 F.2d 733, 736 (2d Cir. 1978) (*Van Gemert III*) (A27a). Plaintiffs then moved for, and were granted, reargument *en banc.* The Court of Appeals *en banc,* affirmed the District Court on the source of attorneys' fees, expenses, and disbursements. *Van Gemert* v. *Boeing Co.,* 590 F.2d 433 (2d Cir. 1978) (A1a). To review the *en banc* decision, this Court granted *certiorari.*

The issue here is *not* the amount of fees of plaintiffs' counsel, only their source. After a decision here, the District Court, which has not yet even determined the compensation of plaintiffs' counsel, will compute the amount in accordance with the current criteria for such calculation. This Court will not confer any so-called "windfall" benefit on plaintiffs' counsel by affirming the decision below.

Although the decision below states that only 20% of the judgment has been claimed (A16a), the *amicus* brief filed here by the Special Master indicates in excess of 45% of the judgment is now claimed. The low response in proofs of claims filed cannot be attributed to any inadequacy in the efforts by plaintiffs' counsel or the relief granted by the judgment. The Special Master has attributed the low response to "both the passage of 12 years and the fact that the debentures were unregistered" (A16a).* Efforts by the Special Master to locate class members are continuing.

There is a further, perhaps the principal, reason for the slow response. Boeing maintained throughout the litigation that those class members who redeemed their debentures during the litigation, *85% of all class members,* waived any right to damages and, in fact, notified such redeeming class members of its position.** Years later the

* Both reasons are the result of the defendants' actions. In *Van Gemert I,* the court held defendants liable as the Debentures themselves did not adequately apprise the class members of the notice to be given of the expiration of conversion rights. *Van Gemert I, supra,* 520 F.2d at 1383. The court further ruled the Debentures were insufficient in failing to give notice to the class members that they could receive "mail notice by registering their debentures." *Id.* The absence of registration, and the resulting inability of the Special Master to yet locate all class members, is attributable to the very same acts by defendants which resulted in the judgment against them.

** Very early in the litigation plaintiffs' counsel attempted to enjoin Boeing from notifying redeeming bondholders that any redemption would be a waiver of damages. Judge Ryan, at that early stage of the litigation, refused to enjoin Boeing from so notifying

District Court ruled that there was no waiver. Yet Boeing failed to notify the late redeemers of that decision. As a result, many redeeming bondholders may not have claimed their portion of the judgment in the mistaken belief that they had waived their right to a recovery. Moreover, the vast majority of Debentures redeemed during this litigation were redeemed through banks and brokerage houses which retained the names of their clients without forwarding them to Boeing. Boeing failed—whether purposely or not is unknown—to advise those institutions of the pendency of this litigation and the critical necessity of retaining the names of those for whom they were redeeming. As a result of Boeing's failure to insure retention of those names, the lists were, with the passage of time, routinely destroyed by the banks and brokerage firms, thereby rendering difficult, if not impossible, the Special Master's locating these missing class members at this late date.

Boeing's further contention—that there will be no incentive for plaintiffs' counsel to find these absent class members if fees are awarded out of the unclaimed portion of the judgment fund—simply has no application here. The District Court appointed a Special Master (A41a-42a) to locate claimants and placed that responsibility primarily on his shoulders, not counsel's. Plaintiffs' counsel have cooperated in the efforts to locate class members and will continue to do so.

The issue here is the source of the fees, not their amount. In reviewing the relevant case law on that narrow issue, the unique nature of this case is important. Its termination is very different from the great majority of class

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bondholders even though he indicated that he did not believe that the redemption would cause a waiver of rights in the litigation. *See* Transcript of hearing before Hon. Sylvester J. Ryan, September 19, 1966. Notwithstanding Judge Ryan's statement, Boeing did notify the redeeming bondholders of its waiver position.

actions in that, after trial, judgment was here entered for the *full amount claimed, plus pre-judgment interest.* As Circuit Judge Oakes wrote, dissenting in part from *Van Gemert III, supra,* 573 F.2d at 737:

> A decade of hard-fought difficult litigation has at last resulted in an award to the debenture holders which, had the original notice been sufficient would have rightfully been theirs for the asking. In the process, against uphill odds, the lawyers for the now successful plaintiffs did an extraordinarily capable job, having even "made new law" on a complicated set of facts. Thus, criticism against class actions generally or plaintiffs' attorneys' fees in particular falls flat when focused on the case at bar. (A35a) (Footnote omitted).

Summary of Argument

The decision below correctly analyzes both the recent and early decisions of this Court uniformly supporting the award of plaintiffs' legal fees from the full amount of the fund deposited by Boeing. As consistently recognized by this Court beginning with *Trustees* v. *Greenough,* 105 U.S. 527 (1881), through *Sprague* v. *Ticonic National Bank,* 307 U.S. 161 (1939), and finally *Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240 (1975), equity and precedent direct the payment of fees to plaintiffs' counsel from a common fund they created for the benefit of a class.

In *Alyeska* this Court approved the almost century-old line of precedents beginning with *Greenough* which, upon the creation of a common fund, award fees, not from the amount claimed, but from the entire fund created. This Court reaffirmed those holdings by stating that "a party preserving or recovering a fund for the benefit of others in addition to himself" may "recover his costs, including

his attorneys' fees, from the fund or property itself . . ." *Alyeska,* 421 U.S. at 257.

In the seminal decision of *Trustees* v. *Greenough, supra,* this Court stressed that it was the creation of a fund, not the vagaries of the amount of claims, which entitled plaintiff to reimbursement from the fund. Assessing the entire fund would distribute the cost ratably among all entitled to claim. The number of claims is immaterial since it is the creation of the fund which confers the benefit.

Trustees v. *Greenough* was re-emphasized in *Sprague, supra.* That subsequent action was not brought for a class, but the decision had a *stare decisis* effect on other claimants to a fund. Even though the other potential claimants were not before the court, and may never have subsequently brought their own suits to claim their portions of the fund, the plaintiff in *Sprague* was permitted to look to the entire fund as a source for reimbursement of counsel fees.

This Court's decision in *Alyeska, supra,* in no way overruled or modified the decisions in the common fund cases. Instead, *Alyeska* is a brake on the recently decided cases which shift plaintiffs' legal fees to defendants as a consequence of the successful prosecution of class actions where no common fund is created, but where the benefit created is non-monetary. These fee shifting cases are epitomized by the decisions of this Court in *Hall* v. *Cole,* 412 U.S. 1 (1973) and *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375 (1970).

Hall and *Mills* differ from the instant case since those actions did not involve payment of fees from a common fund, but instead involved a shifting of plaintiff's counsel fees to a defendant where a non-monetary benefit was conferred upon the defendant as well as the plaintiff and

others similarly situated. As in *Hall* and *Mills,* plaintiff's counsel in *Alyeska* sought to have its fee shifted to the defendant. However, since the defendant in *Alyeska* was not a beneficiary of the action as was the case in *Hall* and *Mills,* this Court did not shift the fee.

The instant case, on the contrary, deals with a common fund. Payment from that fund will insure that all class members will bear their pro rata share of the expenses and that the claiming class members do not subsidize the non-claiming.

Boeing has been adjudged liable and has paid the amount of the judgment into an account controlled by the Court. Accordingly, it has no further interest in the common fund, and fees are not being shifted to it. As a result, Boeing lacks standing to prosecute this appeal.

The entire fund will eventually be claimed, as that portion of the fund not paid to class members will escheat to the State of New York. N.Y. Aband. Prop. Law (McKinney 1978) § 1200. New York's interest derives from the rights of non-claiming class members and therefore is subject to the payment of fees to plaintiffs' counsel just as are the interests of the claiming class members.

The judgment entered for damages by the class is a final judgment which Boeing has not appealed. Each class member, both claiming and non-claiming, has a vested property right in that judgment which is clearly a benefit.

To a limited extent this case may involve a shifting of a portion of the fee. Boeing failed to take steps within its power to preserve the names and locations of the 85% of the class members who redeemed during the course of this litigation. Such conduct amounts to bad faith, thereby permitting an assessment of fees against Boeing even if

it has a legal interest in the unclaimed portion of the fund. *Alyeska, supra,* 421 U.S. at 245.

Arguments that an affirmance of the decision below will act as a dis-incentive to the efforts of plaintiffs' counsel to locate missing class members are wholly misplaced. Here, plaintiffs' counsel have fully cooperated in the attempts to locate missing class members. For Boeing to suggest, after fighting since 1966 to prevent any payment at all to the Debenture holders, that plaintiffs' counsel have shirked their responsibilities is the height of hypocrisy. Boeing's contentions that an affirmance will encourage baseless class actions is meritless, as the issue here is not the size of counsel fees, but their source. Based on current judicial criteria, the District Court is required to, and will, determine the amount of counsel fees. Finally, a reversal of the decision below will inject new uncertainties into the prosecution and defense of class actions and will lead to unnecessary delays in their termination.

ARGUMENT

I

Payment of Plaintiffs' Attorneys' Fees and Costs From the Full Amount Deposited Is Consistent With the American Rule Because the Deposit Created a Common Fund for All Class Members.

A. *Fees of Plaintiffs' Attorneys Should Be Charged to the Entire Fund They Have Created.*

Where a common fund has been established,* whether or not as a result of a class action,** the attorneys' fees are charged to the entire fund, regardless of the amount of claims. *Sprague* v. *Ticonic National Bank, supra; Trustees* v. *Greenough, supra.* The decision below properly analyzed these cases in viewing the amount deposited by Boeing as a common fund, available for compensation of plaintiffs' counsel.

In *Greenough,* the plaintiff was held entitled to recover his counsel fees from the entire fund created. The action, on behalf of plaintiff and similarly situated bondholders, succeeded in establishing a fund for the payment of principal and interest due on the bonds. Attorneys' fees and other expenses were sought from the fund created. Although most of the bondholders had filed claims, the decision specifically discloses that some had not. This Court said:

> . . . [A] considerable amount of money was realized, and dividends have been made amongst the bondhold-

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* [I]t is now settled that a *money judgment* or even a settlement can serve as a [common] fund." *Vincent* v. *Hughes Air West, Inc.,* 557 F.2d 759, 770 (9th Cir. 1977).

** The class action is the classic example of the common fund which creates benefits for others. *City of Klawock* v. *Gustafson,* 585 F.2d 428, 431 (9th Cir. 1978).

> ers, *most of whom came in and took the benefit of the litigation. Id.* 105 U.S. at 529. (Emphasis added).

Bondholders not claiming were, nevertheless, to have the right to make a later claim.

> The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. *Id.* at 531.

In *Greenough,* where some bondholders had not claimed their portion of the judgment fund, this Court held that the most equitable manner of paying plaintiffs' legal fees and expenses was to charge the entire fund. The method was adopted in preference to an alternative of requiring all bondholders to contribute from the recovery. In supporting the payment of attorneys' fees out of the entire fund, claimed and unclaimed, this Court stated:

> He [the plaintiff] has worked for them [the other bondholders] as well as for himself; and if he cannot be reimbursed out of the fund itself, they ought to contribute their due proportion of the expenses which he has fairly incurred. *To make them a charge upon the fund is the most equitable way of securing such contribution. Id.* at 532 (Emphasis added).

Providing for such a disposition in *Greenough* assures, as here, that both non-claiming and claiming class members bear their costs ratably. To limit the source of plaintiffs' counsel fees to the amount claimed works an inequity to the claiming members of the class, as it is they who will bear the expenses of the non-claiming class members.* Since the fund was created for all class members,

* Such expenses could include other expenses in addition to the legal fees, such as the fees of the Special Master and advertising and printing expenses, all of which have been incurred in an effort to find claimants.

the only equitable method of allocating the expenses of its creation is to charge the entire fund, thereby assuring pro rata sharing by all beneficiaries.*

Central Railroad & Banking Co. v. *Pettus,* 113 U.S. 116 (1885), relied upon by Boeing, is distinguishable. In *Pettus,* a pro rata share of attorneys' fees was charged against each claimant. However, the attorneys for the class apparently limited their request for counsel fees to amounts actually claimed. *Id.* at 125. Accordingly, the issue presented here was not addressed in *Pettus.* Although it approved the type of fee award specifically requested by plaintiffs in *Pettus,* the Court did not withdraw its prior ruling in *Greenough* that ". . . a charge upon the fund is the most equitable way of securing such contribution." *Trustees* v. *Greenough, supra,* 105 U.S. at 532.

In *Sprague* v. *Ticonic National Bank, supra,* one party's establishment of liability against a fund, which could be used by other claimants, was sufficient to charge the fund with legal fees. There, plaintiff in an individual action established liability against a fund, consisting of certain bonds held by a bankrupt bank as collateral for trust funds against which the plaintiff had a claim.

* In allocating fees, courts have historically analogized a fund created for a class to recovered salvage. As stated in *Rosenfeld* v. *Black,* 56 F.R.D. 604, 605 (S.D.N.Y. 1972):

> In this kind of case, as Judge Hough once said, the recovery is "like a case of salvage on a derelict".

Counsel for the class have, in a sense, salvaged a derelict for its owner. In a case of salvage, the salvager is entitled to a salvage fee whether or not the owner claims the derelict. The non-claiming class members are similar to the owner of the derelict who does not claim his boat. The salvaged property is available for the payment of salvage fees. *See Medina* v. *One Nylon Purse Seine,* 259 F. Supp. 769 (S.D. Cal. 1966). (The court ordered salvage fees paid out of the value of recovered property, where the owner was unknown, with the remainder to be deposited into court to await claims, if any, of the owner.)

The benefit conferred was simply the *stare decisis* effect on 13 other *cestuis que trusts* of the judgment obtained by the individual plaintiff. Those 13 others were not before the Court in *Sprague,* resulting in a far less direct benefit than in this case where, in addition to liability, a fund has been created in which class members have an absolute right to share. In *Sprague,* each of the 13 *cestuis que trusts* had to sue to recover a share of the collateral bonds. Fees and expenses were awarded out of the proceeds of the collateral bonds, even though the opinion did not indicate if any other beneficiary having an inchoate claim against the "fund" ever claimed.

The award of a fee from the "fund" in *Sprague* compels the payment of fees from the entire fund here. None of the other potential claimants had in fact made claims against the potential "fund" available in *Sprague,* yet this Court held that equity permitted the individual plaintiff to recover fees and expenses from that "fund". Likewise, the failure here of all class members to claim against the fund does not diminish the power of equity to do justice among the beneficiaries by spreading the expenses ratably among them.

The allowance of attorneys' fees from the entire fund as formulated in *Greenough* and *Sprague* is consistent with the New York Statutory lien of plaintiff's counsel in the entire judgment fund.* Such lien laws are common throughout the United States, and to accept Boeing's position would defeat the lien interest of plaintiff's counsel and subvert the policy behind such legislation.

* This statutory lien is granted by N.Y. Judiciary Law (McKinney 1968) § 475, which provides:

> From the commencement of an action, special or other proceeding in any court or before any state, municipal or federal department, except a department of labor, or the service of an answer containing a counterclaim, *the attorney* who appears for a party *has a lien* upon his client's cause of action, claim or counterclaim, *which attaches to a verdict, report, determination, decision, judgment or final order in his client's favor and the proceeds thereof in whatever hands they may come;* and the lien cannot be affected by any settlement between the parties before or after judgment, final order or determination. The court upon the petition of the client or attorney may determine and enforce the lien. (Emphasis added).

B. *Payment of Counsel Fees From a Common Fund Was Not Limited by* Alyeska *Which Analyzed the Shifting of Fees Upon the Establishment of a Common Benefit.*

Greenough and *Sprague* have been regularly applied by the courts in approving fee awards out of a common fund. *See Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. 240 (1975) and cases cited therein at 257-258. The *Greenough-Sprague* rationale has been applied because it provides the most logical and equitable method for apportioning attorneys' fees.

Looking to a common *fund* as a source for the payment of attorneys' fees requires a different analysis with respect to fee awards than in situations where a common *benefit* is established. By combining the common fund and common benefit doctrines (Br. at 13), Boeing not only confuses two separate lines of analysis, but negates the very real distinction between them.

The common benefit theory is a recent offshoot of the venerable common fund theory recognized by this Court in *Greenough.* As noted in *Mills* v. *Electric Auto-Lite Co.,* 396 U.S. 375, 392 (1970):

> Although the earliest cases recognizing a right to reimbursement involved litigation that had produced or preserved a "common fund" for the benefit of a group, nothing in these cases indicates that the suit must actually bring money into the court as a prerequisite

to the court's power to order reimbursement of expenses. (Footnote omitted).

See also Hall v. *Cole, supra.* In *Mills,* a derivative and class action, no monetary benefit was achieved, but because plaintiff's lawsuit prevented a merger of a corporation at an inadequate price, this Court found that not only the shareholders as a group, but the corporation itself was benefited. In *Hall,* an individual action, a member was dismissed from a union for speaking against the union's leadership. His lawsuit led to his re-instatement. Permitting his return into the union was held to have benefited all of its members and the union itself because of the vindication of the members' rights of free speech.

In both instances this Court permitted the fees of counsel for the named plaintiff to be shifted—in *Mills* to the corporation and in *Hall* to the union—because of the benefit to the corporation and its shareholders and the union and its members, respectively. In assessing the fees against the collective entities, this Court determined that the fee was being borne by those who had benefited by the prosecution of the lawsuit. As stated in *Hall, supra,* 412 U.S. at 8-9:

> Thus, as in Mills, [*Mills* v. *Electric Auto-Lite Co.,* 369 U.S. at 397] reimbursement of respondent's attorneys' fees out of the union treasury simply shifts the costs of litigation to "the class that has benefited from them and that would have had to pay them had it brought the suit." (Citation and footnote omitted).

The extension of this common benefit doctrine was rejected in *Alyeska* because the shifting of plaintiffs' counsel fees to the defendant therein would have, unlike in *Mills* and *Hall,* shifted the fees to a party who did not benefit

from the litigation. Accordingly, this Court re-affirmed the American Rule that each party pay his own legal fees by limiting the common benefit approach to situations, such as those presented in *Mills* and *Hall,* where the defendant was essentially the beneficiary of the plaintiff's success.

The rejection of the plaintiff's contention in *Alyeska* that payment of its counsel fees be made by the defendant is a far different matter than whether plaintiffs' counsel fees should be paid from a common *fund* which their lawsuit creates. The payment of fees from a common fund proportionately spreads the cost of the litigation only among those who have benefited from its creation, thereby assuring strict compliance with the American Rule that each party bear his own litigation expenses.

That each class member has benefited by the creation of the fund cannot be denied. Clearly, successful prosecution of a lawsuit leading to a judgment and the deposit of all damages, plus interest, is a benefit to each class member. As stated in the decision below, each member of the class has a present vested interest in the judgment which he may receive on request. (A12a). Courts have long recognized an interest in a judgment as a property right with all its attendant benefits. *State of Louisiana* v. *Mayor of New Orleans,* 109 U.S. 285, 291 (1883); *Gilman* v. *Tucker,* 128 N.Y. 190, 204 (1891).

Inherent in *Greenough* was the recognition that all those entitled to take from a common fund have received its benefit. This Court in *Alyeska* re-affirmed that the creation of a fund is a benefit when it specifically made the following reference to *Greenough:*

> To be sure, the fee statutes have been construed to allow, in limited circumstances, a reasonable attorneys' fee to the prevailing party in excess of the small sums

permitted by §1923. In Trustees v. Greenough, 105 U.S. 527, 26 L.Ed. 1157 (1882), the 1853 Act* was read as not interfering with the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, *from the fund or property itself* or directly from the other parties enjoying the benefit.[30]

[30] Mr. Justice Bradley, writing for the Court in *Greenough*, said the following of the 1853 Act:

> "The fee-bill is [not] intended to regulate . . . *power of a court of equity, in cases of administration of funds under its control, to make such allowance to the parties out of the fund as justice and equity may require.* The fee-bill itself expressly provides that it shall not be construed to prohibit attorneys, solicitors, and proctors from charging to and receiving from their clients (other than the government) such reasonable compensation for their services, in addition to the taxable costs, as may be in accordance with general usage in their respective States, or may be agreed upon between the parties. Act of Feb. 26, 1853, c. 80, 10 Stat. 161; Rev. Stat., sect. 823. *And the act contains nothing which can be fairly construed to deprive the Court of Chancery of its long-established control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.*" *Alyeska, supra,* 421 U.S. at 257-258. (Citation omitted and emphasis added).

While the Court in *Alyeska* may have limited the newly emerging common benefit theory, this Court, by citing *Greenough* and its progeny with approval, sanctioned the rule in *Greenough* and *Sprague* that charging the attor-

* The opponents to the fee application in *Greenough* sought to limit reimbursement to the limited costs payable under an 1853 Act regulating the amount of costs a losing party was required to pay to a winning party. This contention was rejected as inapplicable by the *Greenough* Court, due to the creation of the common fund.

neys' fees against the entire common fund was the most equitable method of distributing the legal and other expenses.

Boeing's application of the criteria set forth in *Alyeska* as a prerequisite to the award of counsel fees from a common fund is erroneous. The analysis in Boeing's brief (16-19) misreads footnote 39 in *Alyeska* which states, in pertinent part:

> In this Court's common-fund and common-benefit decisions, the classes of beneficiaries were small in number and easily identifiable. The benefits could be traced with some accuracy, and there was reason for confidence that the costs could indeed be shifted with some exactitude to those benefiting. In this case, however, sophisticated economic analysis would be required to gauge the extent to which the general public, the supposed beneficiary, as distinguished from selected elements of it, would bear the costs. *Id.* 421 U.S. at 265.

First, as noted in the decision below (A10a), the class here is comparable in size to that of the creditors in *Greenough, supra,* and is smaller than the classes in *Hall, supra* and *Mills, supra.* Second, for the purposes of tracing the benefits accurately, the class membership here is not difficult to identify. Unlike the sprawling throng of potential beneficiaries in *Alyeska,* the Debenture holders in this action are a well-defined class—those who failed to convert. Although the names of each of the individual Debenture holders are not now ascertainable,* the amount owed to each plaintiff can be traced to each Debenture. Unlike *Alyeska,* elementary arithmetic, not "sophisticated

* In large part because of Boeing's conduct during this litigation (see pp. 5-6 and 27-30; *infra*).

economic analysis" is all that is required to determine the proportionate sharing of expenses. Furthermore, the "identification" and "tracing" criteria are met more completely in the instant case than in either *Hall, supra* or *Mills, supra,* neither of which involved monetary benefits.

II

Boeing Has No Right to the Judgment Funds and, Therefore, Payment of Fees From the Fund Will Not Shift Fees to Boeing.

The judgment amount is a common fund created by plaintiffs' attorneys for the benefit of persons other than Boeing. The common fund will be distributed in its entirety to the class, or, in the event of an unclaimed portion, escheat to the State of New York. In no event will any portion of the fund revert to Boeing. *Hansen* v. *United States,* 340 F.2d 142 (8th Cir. 1965); *Pennsylvania R. Co.* v. *United States,* 98 F.2d 893 (3rd Cir. 1938).* Payment of fees from the fund will, therefore, not improperly shift the fees to Boeing.

A. *The Fund Has Vested in the Class Members and Boeing Has No Further Interest Therein.*

In *Hansen, supra,* the defendants depositing funds in satisfaction of a judgment had no further title or right to those funds. The United States had obtained a judgment against Hansen for charging excessive rents in violation of a federal statute. Hansen satisfied the judgment by payment into the General Accounting Office which subsequently transferred the funds to the United States Trea-

* Accordingly, defendants lack standing to appeal from the judgment of the District Court relating to the payment of plaintiffs' attorneys' fees, because it has no remaining monetary stake in the outcome. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974).

sury. Part of the funds deposited remained unclaimed and Hansen moved to reopen the judgment under Fed. R. Civ. P. 60(b)(5) and 60(b)(6) and have the unclaimed portion of the funds returned to him.

In denying the motion on the ground that Hansen had no right to the unclaimed portion, the Court held:

> The defendant consented to the judgment entered against him based upon rentals illegally exacted from named tenants. He has paid such judgment in full and satisfaction thereof has been entered. *Defendant has no title or right to any money he paid to satisfy the judgment. A judgment debtor who has paid his judgment is not the rightful owner of unclaimed portions of the judgment deposited in a trust account in the Treasury pursuant to the statute.* United States v. Klein, 3 Cir., 106 F.2d 213; Pennsylvania R.R. v. United States, 3 Cir., 98 F.2d 893; United States v. Cochrane, 5 Cir., 87 F.2d 3. *Hansen* v. *United States, supra,* 340 F.2d at 143. (Emphasis added).

In *Pennsylvania R. Co.* v. *United States, supra,* a case remarkably similar to the one at bar, the issue of title to the unclaimed portion of a class fund was squarely presented, and resolved against Boeing's contention. There, judgment had been entered against the Railroad in favor of certain bondholders of a subsidiary. In satisfaction of the judgment, the Railroad made payment to the trustee for the bondholders with the instruction that "the trustee . . . make payment to the bondholders whose claims had been proved and . . . deposit the balance of the fund in the registry of the [District Court] . . ." *Id.* 98 F.2d at 894. Eight years after the balance of the judgment had been deposited, the unclaimed funds were transferred to the United States Treasury. Ten years after their transfer,

with a portion of the fund still unclaimed, the Railroad company filed a petition asserting ownership of the remaining funds.

The Court held the Railroad not entitled to the funds because, having been found liable to the individual bondholders, the Railroad had no legal interest in the funds. The court stated:

> When payment of the amount decreed was made by the Railroad Company it was a payment by that company of its indebtedness to the holders of the bonds. *While the payment was made to a trustee for the bondholders the trustee was a mere distributing agent and each of the bondholders acquired title to his pro rata share of the fund.* As the court below pointed out, the situation, *so far as the Railroad Company was concerned, was the same as if it had paid its promissory note to a collecting bank which held the proceeds awaiting the call of the payee. The money with which it made the payment was its money until payment. At that moment, however, title passed to the holders of the bonds. Consequently thereafter the Railroad Company had no more title to the money than it would have had if it had used it to pay any other debt.*
>
> The Railroad Company urges, however, that since no one has as yet claimed the remaining balance of the fund a resulting trust arises in its favor under which the money should be returned to it. With this contention we cannot agree. *As we have said, each of the bondholders received title to his pro rata share of the fund.* Under the provisions of the Act of 1911 the fund may only be paid out to the persons entitled thereto and meanwhile it remains in the Treasury a permanent appropriation for payment to those persons when ordered by the court. *Id.* (Emphasis added).

Defendants here are in the same position. Pursuant to the judgment, Boeing has paid monies into an account at the Chase Manhattan Bank in satisfaction of its liability to the Debenture holders. As shown by *Pennsylvania R. Co., supra,* Boeing has no further claim or title to such money.

Since Boeing has no right to those funds, it lacks standing to complain about their distribution. It has no more title to the fund than it would to money used to pay any other debt. Payment of fees from the fund, therefore, does not shift the fees to Boeing.

B. *Any Portion of the Fund Not Claimed Escheats to New York State.*

New York State is entitled, under its escheat statute, to any funds ultimately unclaimed by class members. N.Y. Aband. Prop. Law (McKinney 1978) § 1200,* *supra.*

The Attorney General of New York has asserted such a claim to the Court below by letters dated April 27 and May 2, 1978.

Defendants' claim that plaintiffs' attorneys are not entitled to fees from that portion of the fund which will at

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* 1200. *Unclaimed property paid or deposited in federal courts.*

All money or other property which shall have been, or shall hereafter be, paid into or deposited in the custody of, or be under the control of, any court of the United States in and for any district within the state, or shall have been or hereafter shall be in the custody of any depository, registry, clerk, or other officer of such court, and the rightful owner or owners thereof either (a) shall have been or shall be unknown for a period of ten consecutive years; or (b) shall have died or shall die without having disposed thereof, and without having left or without leaving a will disposing thereof, and without having left or without leaving heirs, next-of-kin, or distributees; or (c) shall have abandoned or shall abandon such funds or property, are declared to have escheated or to escheat, together with all interest accrued thereon, to and to have become or to become the property of the state.

some later date escheat to New York is totally without merit. The state's right of escheat is a derivative right of succession, rather than an independent claim. The state has no greater rights in the fund than do the individual class members and its right is derived from the class members. *Christianson* v. *King County,* 239 U.S. 356, 370 (1915). In *Application of People of the State of New York,* 138 F. Supp. 661, 666 (S.D.N.Y. 1956), the court stated:

> The state's right of escheat is the right of an ultimate heir; it does not assert a separate claim to the fund but stands in the shoes of those so-called unknown creditors who are deemed to have abandoned their claims. (Citation and footnote omitted).

See also United States v. *Klein,* 303 U.S. 276 (1938) (sustaining the constitutionality of the Pennsylvania escheat statute used by the state to recover unclaimed funds in a bondholders class action; the New York State escheat statute was later, in *Application of People of the State of New York, supra,* found similar to Pennsylvania statute at issue in *Klein.*) The state's interest, not being based upon any independent claim or right to the funds, is dependent upon the underlying rights and liabilities of each non-claiming absentee class member. The fees and disbursements sought by plaintiffs' attorneys should be paid from the entire fund so that all persons having an interest in the fund will bear a ratable share of the expenses incurred in its creation. Only *after* the payment from the total fund of the expenses of administration and plaintiffs' attorneys' fees and disbursements is any class member entitled to his recovery and any third party or stranger, such as a state claiming derivatively by escheat, entitled to assert any rights. To the extent the State of New York acquires any portion of the common fund, it will have been directly benefited by the services of plaintiffs' attorneys.

C. *Final Judgment Has Been Entered in This Case in Behalf of Each and Every Class Member.*

Boeing's arguments that judgments in class actions for damages are not final until individual damages have been claimed and that the $5,749,990.83 deposited by Boeing is not damages awarded but merely the "maximum potential damages of the class" (Br. at 26) ignores the record and the law.

The judgment which was docketed on July 6, 1977 provided as follows:

> ORDERED, ADJUDGED AND DECREED that plaintiffs in behalf of all members of the plaintiff class, which consists of all holders on March 29, 1966 of 4½% Convertible Subordinated Debentures of the Boeing Company who failed to exercise their conversion right before it terminated on March 29, 1966, shall recover as their damages herein from the defendants the principal sum of $3,289,359 together with interest thereon at the legal rates fixed by the State of New York, N.Y.C.P.L.R. §5001(a) from March 9, 1966 to the date of this judgment, with costs to be taxed . . .(A40a)

The judgment states that "15 days after the entry of this *judgment* the defendants shall deposit the amount of this judgment plus interest . . ." (A41a) (Emphasis added). Thus, the judgment was identified as a judgment of damages to the class (A40a), docketed in the District Court as a judgment, and pursuant to it, Boeing deposited the money. Boeing has never appealed from this portion of the judgment. While the District Court may make further orders respecting the administration of the fund, insofar as Boeing's liability is concerned, the judgment is final and it has no further interest in the amount deposited.

Boeing's argument (Br. 23-25) that individual damages must be proved is an attempt to confuse the substantive law of damages with the procedural necessity for each class member to identify himself. Each of the cases cited by Boeing is an antitrust case where the proof of damages involved is that required by the antitrust statutes as an element of the case to be proved at the trial. Whereas damages need be proved in the first instance, here no class member need prove his damages because damages have already been established and membership in the class entitles each class member to an identical amount of damages for each Debenture.

Boeing's citation of cases in which class certification was denied (Br. at 23-25) is inapposite, as those cases were grounded on amorphous, multi-year antitrust classes, involving sometimes millions of potential class members,* as distinguished from the narrow, precise class here. Furthermore, references by Boeing to actions in which class certification was denied are fatuous as it was *Boeing itself which moved for class certification in this action.* Furthermore, as this case was certified as a Fed. R. Civ. P. 23(b) (1) and (b) (2) action, this judgment is irrevocably binding on all class members, present or not. *Mungin* v. *Florida East Coast Ry. Co.,* 318 F. Supp. 720 (M.D. Fla. 1970), *aff'd,* 441 F.2d 728 (5th Cir.), *cert. denied,* 404 U.S. 897 (1971); *Green* v. *Wolf Corp.,* 406 F.2d 291 (2d Cir. 1968), *cert. denied,* 395 U.S. 977 (1969). Having originally sought to obtain the benefit of class certification, Boeing now seeks to avoid what it perceives to be the detrimental

* *See, e.g., In re Hotel Telephone Charges,* 500 F.2d 86, 88 (9th Cir. 1974) (40 million potential class members); *Eisen* v. *Carlisle & Jacquelin,* 479 F.2d 1005, 1008 (2d Cir. 1973), *vacated and remanded on other grounds,* 417 U.S. 156 (1974) (6 million class members, over 4 years); *Boshes* v. *General Motors Corp.,* 59 F.R.D. 589 (N.D. Ill. 1973) (30-40 million class members, over 4 years).

aspects of such certification. This "head I win, tails you lose" argument deserves condemnation by this Court.*

Furthermore, Boeing's reference to a so-called "fluid recovery" is meaningless. No claim is now made for payment to any class member of one cent more than the amount by which he himself was injured by Boeing. Each class member will be compensated by his pro rata share of the judgment. As a result, payment from the entire judgment of each class member's share of counsel fees and other expenses, assures a proportionate payment by each class member who benefited from the creation of the common fund.

III

Even if Boeing Still Has an Interest in the Unclaimed Portion of the Judgment, Plaintiffs' Counsel Fees Should Be Charged Against the Entire Judgment Fund Because of Boeing's Bad Faith During the Course of This Litigation.

If this Court views (a) only the amount claimed and not the entire judgment fund as a common fund and (b) the unclaimed portion as Boeing's property, the fees of plaintiffs' counsel should be paid from the entire judgment fund as Boeing has, during the course of this litigation, "acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . ." *Alyeska, supra,* 421 U.S. at 258-

* Boeing's citation (Br. at 20) of the Advisory Committee Note to Rule 23 in 39 F.R.D. 69, 98-107 (1966) also ignores the very real difference between a judgment in a 23(b)(1) or (b)(2) action such as this and a 23(b)(3) action. Thus, the same Advisory Committee Note itself stated:

> In a (b) (1) or (b) (2) action the judgment "describes" the members of the class, but need not specify the individual members; in a (b) (3) action the judgment "specifies" the individual members who have been identified and describes the others. *Id.* at 105.

259 (citing *F.D. Rich Co.* v. *United States, Industrial Lumber Co.*, 417 U.S. 116, 129 [1974]).*

Boeing deliberately discouraged debenture holders from preserving their rights. Boeing maintained throughout the litigation that class members who redeemed after the expiration of the conversion deadline, 85% of all class members, waived any right to damages. Early in the litigation counsel for the plaintiffs attempted to enjoin Boeing from notifying redeeming class members that a redemption would be a waiver of their right to damages. Judge Ryan declined to enjoin Boeing from mailing the notice, although he indicated, but did not rule, there was no waiver. Judge Ryan also indicated each class member's right to damages would be preserved. *See* Transcript of hearing before Hon. Sylvester J. Ryan, September 19, 1966. Notwithstanding this indication, Boeing notified the redeeming bondholders of the claimed waiver. The District Court eventually ruled years later that there was no waiver, but Boeing failed to notify those it had previously misled that its waiver position had been rejected. Boeing's gratuitous and self-serving waiver advice undoubtedly discouraged many redeeming Debenture holders from maintaining contact with Boeing or class counsel.

Besides actions aimed at discouraging the Debenture holders, Boeing's acts caused the loss of identity of many Debenture holders. Many Debentures belonging to the class were redeemed through banks and brokerage houses. It would have been a simple matter for Boeing to advise the banks and brokerage houses to preserve the names of the redeeming customers. By failing to so notify the banks

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* As *Alyeska* noted, fee shifting is a recognized exception where the defendants have acted in bad faith. Fee shifting is only involved here to the extent that a portion of the fee is paid from unpaid funds which may be adjudicated to be owned by Boeing.

and brokerage houses, which destroyed certain of their records as a routine matter due to the passage of time, or taking other steps necessary to preserve the names and addresses until the conclusion of this lawsuit, Boeing acted in bad faith. Boeing obviously had no interest in preserving rights of class members. Boeing's bad faith has therefore caused the names of numerous class members to be lost, rendering impossible their sharing in the judgment. Such conduct is especially vexatious if Boeing intended to argue now that expenses should be borne only by claimants. For Boeing to claim the benefit of its bad faith flies directly in the face of *Alyeska* and *Rich, supra.*

This action is similar to *Vaughan* v. *Atkinson,* 369 U.S 527, *rehearing denied,* 370 U.S. 965 (1962), cited in both *Alyeska* and *Rich.* In *Vaughan,* a seaman notified a ship owner of certain alleged claims. The owner made no effort to investigate the seaman's claims until suit was brought. As a result, the seaman was required to hire an attorney, agreeing to pay the attorney a 50% contingent fee.

In imposing the seaman's counsel fees on the ship owner, this Court found:

> In the instant case respondents were callous in their attitude, making no investigation of libellant's claim and by their silence neither admitting nor denying it. As a result of that recalcitrance, libellant was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old. The default was willful and persistent. It is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one. *Vaughan* v. *Atkinson,* 369 U.S. at 530-531. (Footnote omitted).

Just as the owner refused to investigate the libellant's claim in *Vaughan,* Boeing failed to preserve the names of

potential claimants, thereby callously insuring that the erosive effects of time would destroy their rights. Here, as in *Vaughan,* Boeing's bad faith after the accrual of the cause of action was harmful to plaintiffs. The conduct of Boeing is far worse than defendant's in *Vaughan* since rights here may have been completely destroyed by Boeing's conduct. It is difficult to imagine a clearer case of bad faith and wanton disregard for the rights of absent members of a class than here presented. Accordingly, even if Boeing is ultimately adjudicated to be the owner of the unclaimed funds, counsel fees should be awarded from the entire judgment fund so that Boeing does not receive a windfall because of its conduct.

IV

Failure to Award Fees From the Entire Fund Will Result in Unfairness to the Class and Delays in the Termination of Class Actions.

Courts have decried those class actions commenced as "strike suits" or "lawyer's suits" for the purpose of forcing settlement with no real hope of prevailing on the merits. *See, e.g., Reiter* v. *Sonotone Corp.,* —— U.S. ——, 99 S. Ct. 2326, 2334 (1979) (Rehnquist, J., concurring). If there is any class action which is not a "lawyer's suit", this is the case.

As noted in the decision below, if legal fees were charged only to claiming class members, "the standards evolved by the Courts of Appeals to ensure rationality and fairness in fee setting would go for nought . . ." (A14a). The present rule* that the attorneys' fees should be set at a

* *See, e.g., City of Detroit* v. *Grinnell Corp.,* 495 F.2d 448 (2d Cir. 1974); *Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.,* 487 F.2d 161 (3rd Cir. 1973); *Grunin* v. *International House of Pancakes,* 513 F.2d 114 (8th Cir.), *cert. denied,* 423 U.S. 864 (1975). As this Court has recently noted in other contexts, discretion should be given to the District Court familiar with the litigation. *See, e.g., Parklane Hosiery Co.* v. *Shore,* —— U.S. ——, 99 S. Ct. 645 (1979) (application of collateral estoppel) and *Douglas Oil of California* v. *Petrol Stops Northwest,* —— U.S. ——, 99 S. Ct. 1667, 1678 (1979) (permission for counsel in civil litigation to review grand jury documents). In the case at bar the discretion given to the District Court relates to the amount, but not the source, of counsel fees.

sum rationally calculated by considering such factors as the hours spent, hourly rates, the difficulty of the case, and the quality of representation, would be unworkable if the fee was charged only to the portion of the fund claimed. In suits where a relatively small number of claimants appeared, the attorney's fee could leave those claimants with a smaller recovery. In the instant case, where each Debenture holder has an economically significant interest, deducting attorneys' fees only from the claimed portion may leave each plaintiff with very substantially reduced benefits. Such a result could indeed make this a "lawyer's lawsuit", *Van Gemert III, supra,* 573 F.2d at 735. Furthermore, the fears of the courts that class members are not being treated fairly would be realized if only the claiming class members paid for the creation of the entire judgment fund. *See, e.g., Grunin* v. *International House of Pancakes, supra,* 513 F.2d at 127.

Based on the history of this case, Boeing's contention that limiting the fees to the amount claimed will limit class actions in which the attorneys are the beneficiaries while simultaneously protecting "meaningful" class actions, is, at best, disingenuous. To further suggest, as does Boeing here, that an award of fees only from the claimed fund will insure that attorneys will be compensated only for the benefits they have conferred and will prevent the proliferation of attorneys' cases, is absurd.

No one can dispute the creation here of a substantial benefit for the members of the class; no one can claim here that class counsel is the only beneficiary of the judgment.

Furthermore, Boeing's claim that the instant case will insure the proliferation of litigation and the protraction of litigation after the class members have lost interest is untrue. On the contrary, to award fees only out of the amount ultimately claimed would stimulate defendants to delay, for as long as possible, with the hope that after years of litigation many claims (and plaintiffs' attorneys' fees) would be minimized and all unclaimed amounts recaptured by the defendants.

Boeing's other suggestion that in settlement cases a different rule would apply (Br. at 19, n.) is undesirable. A rule providing for fees to be paid only from amounts claimed in a fully litigated action, but not in settled actions, would be a signal to defendants to go to trial and prolong the litigation, as has happened here, with the hope that plaintiffs and claims would wane with the passage of time—thereby reducing any amount actually and ultimately paid by the defendants.

A rule such as that proffered by Boeing only promotes the financial interests of the defendants. It does not advance or safeguard the rights of the victims of defendants' actions and it certainly does not advance those of the courts.

This case demonstrates the class action procedure serving the interests of the Court by consolidating a number of separate actions by numerous parties, all of whom had been substantially damaged by one transaction. A significant amount of court time was saved by this consolidation. This action is hardly a "lawyer's lawsuit" but instead a hard-fought, law making, protracted litigation which resulted in a complete recovery for the class.

In this action, plaintiffs' counsel have performed their obligations to the class and to the Courts in the highest tradition of the legal profession. To the extent there are abuses in class actions, this case is no such example. To penalize claimants because of the inability of the court-appointed Special Master to find persons thirteen years after this litigation arose, and years after relevant records were destroyed because of Boeing's failure to properly notify banks and brokerage houses to preserve those records, would not only be inequitable, but would, in fact, encourage defendants in class actions to protract the litigation and thereby congest the courts with cases.

CONCLUSION

The judgment of the Court of Appeals (*en banc*) should be affirmed.

Dated: New York, New York
July 27, 1979

Respectfully submitted,

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